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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1974

No. 74-26

ERNEST McNEAL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX TO APPLICATION

	Page
Reference to Report of Opinions	2
Statement of Jurisdictional Grounds	2
Questions presented for Review	2, 3, 4, 5, 6
Constitutional Provisions Involved	6
Statement of the Case	7 et. seq.
Reasons for Granting the Writ	12 et. seq.
1. Failure of the Sixth Circuit to decide issues presented it by appellant on appeal, and the sidestepping of the same, constituted a denial of due process and fundamental fairness, where the issues sidestepped were of constitutional dimension	12
2. The Sixth Circuit Opinion herein, permitting the drawing of a master jury wheel from other than the most recent "available" federal or state general election registration lists is in conflict with the decisions of the Second and Eighth and Fifth Circuits, and other District Court decisions, upon the same question	13, 14
3. The Sixth Circuit opinion, permitting the intervention of private, unauthorized persons, in the jury selection process, and the taking of jury records to a private home, during the compilation of the master jury wheel, is in conflict with other decisions of the U.S. Supreme Court, and other Circuit Courts, and other District Courts	15, 16

Page

4. It is an unconstitutional restriction of the right of cross-examination to preclude an accussed from eliciting whether a prosecution witness was a drug addict, an admitted perjuror in another court, a seller of narcotics, or ever involved in a narcotic related armed robbery 16, 17, 18

5. It is an unconstitutional restriction of an accused's Sixth Amendment right to cross-examination of a government witness to preclude said accused from ascertaining matters relative to that witness' impeachment, by honoring the witness' claims of privilege based on the fifth amendment and other non-constitutional grounds . 19, 20, 21

6. It is an unconstitutional restriction of an accused's constitutional right to compulsory process, for the trial judge to refuse to permit the accused to put on witnesses in his defense, whose testimony would tend to impeach his principal accuser; and, it is likewise impermissible for a United States Attorney to cause a subpoenaed witness to conceal testimony sought to be subpoenaed by the accused 23, 24, 25, 26

7. It is a denial of due process for the government to fail to preserve and make available to the defense evidence which might lead a jury to entertain a reasonable doubt of the defendant's guilt 27, 28, 29

Page

8. Failure of the jury clerk to comply with the provisions of §1869(e), Title 28 U.S.C., by use of the most recent "official" state or federal general election registration lists, at the time of the filling of the master jury wheel, voided the grand and petit juries in this case, and intervention of unauthorized persons in the selection process, and the removal of court records from the court, voided the grand and petit juries in this case 29-37

9. It is a denial of due process for a court of appeals to deliberately refuse to decide questions properly raised by an appellant on his appeal 38

Conclusion 38

Appendix:

Exhibit "A"—Opinion of the Court of Appeals 39, 40

Exhibit "B"—Order Denying Rehearing ... 42

Exhibit "C"—District Court's Opinion Denying Rehearing 43

Exhibit "D"—District Court's Opinion 48

Exhibit "E"—District Court's Order Denying Motion to Questions 55

LIST OF AUTHORITIES

	Page
Abbott v Mines, 411 F2d 353 (1969)	36
Barber v Page, 390 US 719, 20 L Ed 2d 255, 88 SCt 1318	19
Brady v Maryland, 373 US 83, 10 L Ed 2d 215, 83 SCt 1194	6, 16, 29
Branzburg v Hayes, 408 US 665, 33 L Ed 2d 626, 92 SCt 2646	3, 11, 19, 20
Brookhart v Janis, 381 US 1, 16 L Ed 2d 314, 86 SCt 1245	19
Bryant v United States, 437 F2d 642, DC Cir (1971)	6, 11, 27, 28
Chambers v Mississippi, 410 US 284, 35 L Ed 2d 297, 93 SCt 1038 (1973)	19, 25
Fletcher v United States, 158 F2d 321 (1946)	17
Gilmore v United States, 256 F2d 565, 5 Cir (1958)	22
Glasser v United States, 315 US 60, 86 L Ed 681	5, 15, 35
In Re Oliver, 333 US 257, 92 L Ed 682, 68 SCt 499	4, 26
Johnson v United States, 163 Fed 30, 1 Cir	14
Morrissey v Brewer, 408 US 471, 33 L Ed 2d 484, 92 SCt 2593	38
People v Esse, 8 Mich App 362, 154 NW2d 545	23
Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 SCt 1065	28

Page

Rabinowitz v United States, 366 F2d 34, 1966 14

United States v Augenblick, 393 US 348, 21 L Ed 2d 537, 89 SCt 1065 18

United States v Barnes, 486 F2d 776, 8 Cir, 1973 . 21

United States v Blair, 470 F2d 331, 5 Cir, 1973 .. 13, 32

United States v Bryant, 437 F2d 642, DC Cir, 1971 ..... 6, 11, 27, 28

United States v Deardorff, 343 F Supp 1033, DC-NY, 1971 ..... 14, 32

United States v Griffin, 382 F2d 823, 6 Cir 17

United States v Guzman, 317 F Supp 140 13

United States v Guzman, 468 F2d 1245, 2 Cir, 1972 13

United States v Guzman, cert den 410 US 937, 35 L Ed 2d 602, 93 SCt 1397, Feb., 1973 ..... 13, 32

United States v Liddy, 354 F Supp 208, DCDC, 1972 ..... 11, 19, 20, 21

United States v Matthews, 350 F Supp 1103, DC Del, 1972 ..... 14, 32

United States v Murphy, 224 Fed Reptr 554 35

United States v Roemig, 52 F Supp 857, DCNDIa, 1943 ..... 16, 35

United States v Zirpolo, 450 F2d 34 36

Washington v Texas, 388 US 14, 18 L Ed 2d 1019, 87 SCt 1920 ..... 4, 26

Webb v Texas, 409 US —, 34 L Ed 2d 330, 93 SCt 351 26

Statutes and Authorities

	Page
Fifth Amendment to US Constitution	6
Sixth Amendment to US Constitution	6
Jury Selection Act—Title 28 USC, §§ 1861 et. seq.	
§1863	29
§1869(e)	4, 5, 9, 10, 13, 14, 30, 32
§1863(b)(1) & (b)(3)	34
§1869, Title 28 USC	34
1968 US Code Cong & Adm News, p 1806	30, 33
Michigan Compiled Laws §§ 168.497 & 534	31

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Ernest McNeal Jr., prays that a Writ of Certiorari will issue to review the Judgment, and absence of Judgment, of the United States Court of Appeals for the Sixth Circuit, affirming his conviction upon one count of purchase, and two counts of sale of narcotics, and sentences of ten, fifteen and fifteen years imprisonment, upon each of said counts.

REFERENCE TO REPORTS OF OPINIONS

United States v. *Ernest McNeal Jr.*, decided December 27, 1973, as a per curiam decision is attached as an appendix, and is reported at — F2d —.

The Opinion of the Court of Appeals, denying rehearing of the Appeal which was entered on June 4, 1974, with Justice Wade McCree, dissenting, is also attached hereon as an appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment of the Court of Appeals for the Sixth Circuit was entered on December 27, 1973. A timely petition for rehearing filed on January 7, 1974, was denied on June 4, 1974. Jurisdiction of this Court is invoked under Title 28, USC, §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner was sentenced to Ten (10) and to Fifteen (15) year terms of imprisonment to be served concurrently, for the alleged purchase and sale of 17.7 and 41 grams of heroin, on February 6th and 16th of 1970, respectively.

During his jury trial the presiding judge refused to permit the petitioner to call witnesses of his own choosing to impeach a government informer who testified against him. The trial judge also refused to permit the petitioner to have the government produce the personnel records of the

sole BNDD agent appearing against him; and further denied the petitioner herein the right to inquire into the agents' background on cross-examination. The trial judge further prevented the petitioner herein from questioning the government informer as to her prior criminal involvement in an armed robbery; as to whether she had ever herself sold or used drugs; as to whether she had been guilty of shoplifting; or testified falsely in another criminal proceeding against a man who was subsequently released when her perjury was uncovered.

The United States Court of Appeals declined to rule in any way upon the petitioner's claim that his Sixth Amendment Constitutional right to call witnesses in his defense had been abridged; and accordingly, the following questions are here presented for review by the United States Supreme Court:

a) WHETHER any United States Court of Appeals can, within the meaning of the due process clause, arbitrarily and without reason, refuse to rule upon a substantial constitution question properly assigned as error, and presented it for review.

b) WHETHER any trial judge, within the contours of *Branzburg* v. *Hayes*, 408 U.S. 665, notes 15, & 16, can permit witnesses appearing against an accused at jury trial, to refuse to answer questions regarding his or her background, on the basis of a personal privilege, where the honoring of such personal privilege conflicts with, and impairs a defendant's Sixth Amendment rights of confrontation and cross-examination, as well as the over-all due process policy interest in fair trials and fair law enforcement.

c) WHETHER the petitioner's Sixth Amendment right to have compulsory process for obtaining wit-

nesses in his favor was fundamentally impaired, and a fair trial denied him, by the trial judge's refusal to permit him to call witnesses who could give evidence arguably material to the defense of the accused, in light of *In Re Oliver,* 333 U.S. 257, 273; and *Washington* v. *Texas,* 388 *U.S.* 14, 18, and 19.

2. The petitioner, on his trial, moved to quash the jury panel on the ground that the jury fixed for his trial derived from a panel selected in disregard of the limitations of the Federal Jury Selection Act, (Title 28 U.S.C., §1869(c)), and the Jury Plan adopted thereunder for the Eastern District of Michigan. Among other things, the Master list from which the jury was drawn, derived from a master wheel compiled under a local jury plan, adopted September 23, 1968, to be effective December 22, 1968.

Instead of the source of names for that master wheel being the official registration lists of voters eligible to vote in the most recent State or Federal general election, "*maintained by State or local election officials,*" as required by §1869(c) of Title 28 U.S.C., the names for the master wheel here involved, derived from an outdated xeroxed copy of an election list held by a State Recorder's Court jury commissioner. Also, a sister of the U.S. District Court Asst. Jury Clerk, assigned the responsibility for compiling the list, who was not herself a "Court Clerk," assisted the assistant clerk in copiling the master list, which, under the testimony was taken out of the court house and to the assistant's home when she left the court house.

Accordingly, the following questions are here presented for review by the United States Supreme Court:

a) WHETHER the registration lists used for the selection of federal jurors can derive from any place,

or persons, other than "State or Local *election* officials," within the ambit of §1869(e), Title 28 U.S.C., which states that "*Voter registration lists*" *shall mean the official records "maintained" by State or Local election officials;* and WHETHER a jury selected from a wheel compiled in violation of this section is unlawfully selected and must be quashed.

b) WHETHER a jury selected from lists other than the "*most recent State or most Federal general election*" registration lists is unlawful and subject to quashal, within the requirements of §1869(e), Title 28 U.S.C.

c) WHETHER the participation in the jury selection process of any person other than a "clerk" of the Court voided the panel selected with the meaning of the rule announced in *Glasser* v. *United States,* 315 U.S. 60, on page 85, that jurors in the federal court must be selected by the *clerk* of the court, and that the duty of selection may not be delegated; and WHETHER taking jury selection papers to a clerk's home is unauthorized by both the letter and spirit of the Federal Jury Selection Act, and the local Jury plan adopted thereunder, and whether such acts required that the court quash the jury panel so selected, upon the petitioner's motion.

3. The sales of drugs charged to the petitioner antedated his trial by three and one half years, during which period the government agent had participated in other duties. He had never seen the actual seller of the drugs during the intervening three and one half years. His 3500 materials description of the seller as being "light complexioned, freckled man with bulging eyes," did not fit the peti-

tioner. The petitioner himself denied any complicity in, or knowledge of, the offenses charged. The agent testified that, at the time, the seller of the drugs gave him a five ($5.00) dollar bill in change, together with a handwritten note containing two telephone numbers. The petitioner, upon trial, demanded production of both of these items. The agent denied having possession of either, and could not explain what happened to them.

Accordingly the following question is presented the Supreme Court for review:

a) WHETHER the Petitioner was denied a fair trial, within the meaning of *Brady* v. *Maryland*, 373 U.S. 83; and whether or not the holding of *U.S.* v. *Bryant*, 437 F2d 642, DC Cir, 1971, is required to be followed here.

CONSTITUTIONAL PROVISIONS INVOLVED

V Amendment to the United States Constitution.

No person shall . . . be deprived of his life, liberty, or property, without due process of law.

VI Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

STATEMENT OF THE CASE

(Numbers in parentheses refer to pages of the original record)

The Government's substantive case against the petitioner was made out by the testimony of BNDD agent, Garfield Hammonds, and his informant, Oranetta Burton. The two transactions occurred on February 6, and 16, of 1970.

The Agent, at the time made up reports which described the seller of drugs as "a light complexioned, freckled man, with bulging eyes." This description did not fit the petitioner. Moreover, the sales transpired in Apt 1 of the building in which the petitioner lived, though his apartment was Apt #4.

The Agent claimed that on the February 6th sale, he, while with his confidential informant, paid $880.00 to the petitioner, and was given $5.00 in change, together with a note containing two telephone numbers in the sellers own hand. The informant could not remember the matter of the five dollars, and the agent did not retain either the five dollars, or the note as evidence, or possible exhibits, to be introduced on trial. He could not explain either, what had happened to either the money or the written note. The defense demanded production of both of these items, along with production of the personnel file of the agent. None was produced. (A 612, 616)

Further, on the trial, the petitioner sought to inquire as to the agent's background, prior to his employment with the department. The court disallowed this inquiry, on the government's claim that "this line of questioning might result in the disclosure of the whereabouts of the agent's family." (A113 to 117)

When the petitioner attempted to offer independent witnesses on his own behalf to establish that the informant

was a drug addict; and that she had been guilty of a heinous robbery armed offense, which she was permitted to get out of in return for her agreement to testify against the defendant; and that the informant had testified falsely in a State Court proceeding and caused another man to be imprisoned until her perjury was uncovered, the trial court refused to permit these witnesses to appear on behalf of the petitioner. (A 408-411, 634, 635, 642) (A451)

Throughout the petitioner's attempts to cross-examine both the BNDD agent, and the informant, the trial court permitted both to decline to answer questions propounded them, on the basis of personal privilege, and, in the informant's case, on the broad claim of privilege under the Fifth Amendment. (A 422-428, 438, 439)

The trial court allowed these claims of privilege, and at the same time disallowed the petitioner's motions to strike the witnesses testimony, and to dismiss the pending causes. (A 645-647)

Finally defense counsel had to say to the court:

> *In view of the limitations that have been placed on me I am compelled to relinquish my right to cross examine. I do feel, however that my Sixth Amendment rights have been violated, I would like to continue on with it.* (A 478)

In addition to the foregoing occurrences during the trial of the cause, on September 23, 1968, pursuant to the Federal Jury Selection and Service Act of 1968, 28 U.S.C., §1861 et, seq., the Eastern District of Michigan, adopted a jury plan to become effective on December 22, 1968.

Pursuant to §3 of that Plan, "Names of grand and petit jurors serving on or after the effective date of the plan

were required to be selected from 'Voters registration lists,'" and no other source.

§1869(e), of Title 28 U.S.C. defined "Voters Registration Lists" as meaning the official records "*maintained* by State or local election officials" of persons registered to vote in either the most recent State or most recent Federal general election.

On hearing held prior to trial, it was determined that the Master wheel from which both grand and petit juries here involved derived was compiled during the August to December of 1968 period, and that the jury clerk responsible or its compilation had not taken the names thereon from the official voters registration list maintained by election officials; but had taken them from xeroxed copies of a 1967 list furnished by the Jury Commissioners of the Detroit Recorders Court. (A 43, 250)

In addition to the foregoing, it developed at the hearing that the "official lists" could easily have been obtained from the proper election officials, on 24 hours notice, by computer run, and without cost to the government. (A 11, 168) Further the election officials testified that the list is in a constant state of flux, but that their computer run would include those lawfully entitled to vote to within one week of whatever time a request for the registration lists might be made. (A 168)

Against the foregoing, testimony of one of the Asst. Clerks, Ethel Robiscoe, indicated that the jury clerk, Jeanne Burge, not only took home "records that belonged to the court, and were being used to compile the master jury wheel," (A 246); but that while the wheel was being compiled, the responsibile jury clerk had her sister, who was not an assistant court clerk, come to the federal building,

on Saturdays to assist in the compilation. (A 191, 192) No testimony anywhere denied these averments.

The petitioners motion to quash was denied by both the District Court, and the Court of Appeals, The Court of Appeals blanketly overlooking the clear testimony of the Court Clerk, Mr. Johnson, that he was apprised of the fact that Miss Burge was taking records home which were used for compiling the master list, (A 240) stated:

> *As to the sister of the jury clerk, there is no evidence that she played any role in choosing names for the jury wheel, nor is there any hint of misconduct on her part.*

Nothing whatever was said by the Court of Appeals in its decision of the fact that the records of the Court were taken to the jury clerk's home, and that there was positive undisputed evidence in the hearing record to establish that during the compilation of the master wheel, Jeanne Burge's sole responsibility was the compilation of the master wheel, and that the only testimony adduced was that she nightly took home her work from the court. (A 191, 192)

Further the Court of Appeals went on to hold that, as a matter of law, in the period August 1968 to December 1968, the "most recent State or Federal general election" within the meaning of §1869(c) of Title 28 U.S.C., was that of November 8, 1966.

Petitioner timely filed his motion for rehearing, and brought to the attention of the Appeals court, its failure to rule upon the question of the denial to him of his right to produce defense witnesses, and the plain error inherent in its Jury rulings; pointing out what the Congress had stated its intention to be in 1968 U.S. Code Cong. & Adm. News, p. 1806; and indicating that the Federal Primary

of August 6, 1968, was the most recent State and Federal general election, from which the master list would have to be chosen.

The Court of Appeals, by persisting in its error with regard to the Jury question, and in refusing, even after being notified, to decide the sixth Amendment question relating to the trial court's declination to allow the production of defense witnesses, has simply, and inexplicably demonstrated a total disregard for the law, of such magnitude as requires the intervention of a higher court, if justice is to be afforded the petitioner.

Moreover, there is simply no way for this petitioner to believe that the Court of Appeals could in good faith distinguish the situation presented in the case of *U.S.* v. *Bryant*, 439 F2d 642, DC Cir, 1971, and that presented in the instant case. On rehearing the petitioner pointed out that the evidence destroyed or witheld by the BNDD agent, in the within case to wit: a five dollar bill and a handwritten note in the sellers hand, could easily have been such as would lead a jury to entertain a reasonable doubt about the defendant's guilt? Yet, that court simply held that Bryant had no application, without a single word justifying that bold assertion.

Furthermore, on rehearing, the petitioner pointed out what Judge Sirica had to say in *U.S.* v. *G. Gordon Liddy, et. al.*, 354 F Supp 208, 215, to the effect that:

> *It stands reason on its head to contend that justice is served when a prosecution witness may deny a defendant access to materials . . . that might be admissible to impeach that witness.*

The petitioner moreover, pointed out in his motion for rehearing, that *Branzburg* v. *Hayes*, 408 U.S. 665, and

Liddy, supra, both held that no claim of privilege can avail to permit a witness to refuse to answer questions put him by a defendant where the testimony might tend to impeach that witness; and that particularly, as to the $5.00 bill claimed to have been given the BNDD agent by the petitioner, and the handwritten note, both of these things would tend to either exonerate the defendant, or impeach the witness. It was further pointed out that, as to the informants drug addiction and prior perjury, both of these items would tend to impeach the informant.

The Court of Appeals denied the petitioner's request for rehearing, with only Judge Wade McCree, evidencing any dissent.

REASONS FOR GRANTING THE WRIT

Petitioner is under service of fifteen (15) years imprisonment, without possibility of parole, for two alleged sales of heroin, which he denies making.

But, the constitutional issues presented by the facts of record at bar reach far beyond the fate of the individual petitioner.

Not only is the clear interpretation of the Federal Jury Selection and Service Act involved; but the entire concept of "fundamental fairness," is involved in whether a conviction should be allowed to stand where issues presented an Appellate court have been deliberately, and shamefully sidestepped, and not decided. Fundamental fairness is especially involved where the issues ducked by the Appeals court *require* reversal of his conviction, and relate to the most fundamental Sixth Amendment rights of confrontation

and cross-examination, and to the right of subpoening and calling witnesses in support of one's defense.

This appeal should be allowed as a matter of prophylaxis, and superintending control over inferior courts which sometimes display a flagrant disregard of the rights of those whom they believe have no avenue open to remedy the wrong.

We have come seeking a Writ of Certiorari, plainly and simply because we have no other place to go to make real and effectual the guarantee and promise of "fundamental fairness" inherent in the American judicial system.

Moreover, the decision of the Sixth Circuit which we complain of, validating resort to an outdated 1967 Voters Registration list, where a 1968 list was available at the time of the filling of the master jury wheel for the Eastern District of Michigan, flies in the very face of *United States* v. *Guzman,* wherein both the District and Circuit Court opinions declared that the voters registrations list to be resorted to for the filling of a master jury wheel had to be that showing persons registered to vote in the most recent federal or State general election, *unless* there existed "no alternative list readily and practicably available."

> *U.S.* v. *Guzman,* 337 F Supp 140, 145, 1972;
> *U.S.* v. *Guzman,* 468 F2d 1245, cca 2, 1972;
> *U.S.* v. *Guzman,* 410 US 937, 35 L Ed 2d 602, 93 SCt 1397, certoriari denied, February 20, 1973.

The decision of the Sixth Circuit herein also conflicts with that of the Fifth Circuit on this same point, where, in *United States* v. *Blair,* 470 F2d 331, 1973, that circuit determined that §1869(c), Title 28 U.S.C. required use of the voters registration lists for the most recent State or

Federal general election, updated to "the latest practicable date."

The decision of the Sixth Circuit, herein, also conflicts with the holdings of other District courts.

Viz: *U.S.* v. *Deardorff*, 343 F Supp 1033, 1042, DCNY, '71. Also, *United States* v. *Matthews*, 350 F Supp 1103, 1110, DC Del, 1972, where the court determined that §1869(c), Title 28 U.S.C., insured that, at the time of the filling, or refilling of the master jury wheel, the clerk would have to resort to the most recent "official records *available* in time to permit the clerk to comply with the statutory intent."

That, in the within case, the Sixth Circuit not only validated resort to a 1967 list in August of 1968, where a 1968 "official" list was readily available from the appropriate election officials, but it also validated procurement of the names from xeroxed copies of outdated lists maintained by a State Recorders Court jury commission.

If the Sixth Circuit interpretation of §1869(c), Title 28 U.S.C. is correct then the section can be interpreted out of the Act to meet any situation regardless of the plain congressional intent. If use of a list two (2) years older than that required by Congress is O.K., then why not one Four (4) years, or Eight (8) years older? The import of the Sixth Circuit decision, as it now stands, is to "ignore the mood of Congress summarized by its legislation, (and this) is to abdicate judicial responsibility." (Justice Holmes, from *Johnson* v. *U.S.*, 1 cir., 163 *F.* 30, 32, 18 LRANS 194)

If the Sixth Circuit ruling herein is correct, then *Rabinowitz* v. *United States*, 366 F2d 34, 1966, has to be deemed modified to the extent that Rabinowitz, on page 59 says:

> *What the law clearly does require is that standards and designs prescribed by Congress be followed;*

and also, that there are impermissible departures from the statutory scheme for the compilation of jury lists, that render such juries unconstitutional.

Whatever the effect of deviations from the strict language of the Jury Selection Act is to be, must be declared by the Supreme Court. This is especially so where every jury trial held in the United States holds the possibility of challenge to the Grand and Petit arrays, and where, in the absence of any clarifying declaration, as many different variant decisions may result as there are courts in the United States.

Furthermore, where *Glasser* v. *United States*, 315 U.S. 60, 86 LEd 681, plainly states, at pp 85 (U.S.) and 707 (LEd), that *"Jurors in a federal court are to be selected by the clerk of the court, and that the duty cannot be delegated,"* it becomes important to have this matter spelled out for the benefit of persons otherwise inclined to bring unauthorized individuals into the selection process, at one point or the other, in deliberate perversion, by administrative fiat, of the plain mandate of the law, on so fundamental a question.

The same consideration applies to the matter of the jury clerk taking home papers required to remain within the confines of the clerk's office in the federal building. The within appeal requires resolution of whether a jury clerk can properly take jury records to her home, and the resulting panel remain untainted thereby.

Certiorari should be allowed the petitioner herein, because in the final analysis, *"The government of the United States, by which the rights of its citizens under the law should be jealously guarded, cannot itself be allowed the optional privilege of lawlessness in bringing those citizens*

before the bar of justice. It must not violate the law which it promulgates for the preservation of its own existence, and majesty, and dignity; and then demand that its courts resolve in its favor a doubt whether its violation of the rights of the citizen has subjected him to practical injury. *U.S.* v. *Roemig,* 52 F Supp 857, 862.

Further, and in addition, in this case, the hospital records were kept from the defendant because the U.S. Government affirmatively acted to see that they were removed from among the hospital files.

If *Brady* v. *Maryland,* 373 U.S. 83, 10 L Ed 2d 215, 83 SCt 1194, means anything, it certainly operates to prevent the U.S. Attorney from suppressing evidence favorable to the accused.

What occurred here was deliberate frustration of the Sixth Amendment right to "have process for obtaining witnesses in his favor; and nothing could seem more apparent.

I.

FAILURE OF THE TRIAL COURT TO PERMIT FULL CROSS EXAMINATION OF THE WITNESSES APPEARING AGAINST THE PETITIONER ON TRIAL CLEARLY VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHTS.

On affirming the conviction of petitioner, the Court of Appeals said:

> *We have read the instances of limitation of cross-examination complained of by the appellant concerning his trial, and we do not find any relevant questions were excluded.*

That language is the height of hypocrisy; for certainly the Judges of the Sixth Circuit should be required to know

what their very circuit has decided is relevant. In *U.S.* v. *Griffin,* 382 F2d, 823, 828, 829 the Sixth Circuit *reversed* a conviction because the trial judge did not *sua sponte* charge the jury that a drug addict is inherently a perjuror where his interests are concerned. Citing, *Fletcher* v. *U.S.,* 158 F2d 321, 322, 1946.

If then, whether a witness is a drug addict is so important in one case, then how does it loose that importance in another? In this case, the petitioner attempted to establish that the informer was a drug addict. (A 636, 649, 652, 653) The trial judge refused to permit these questions. (A 650)

If an affirmative showing of drug addiction would entitle us to an instruction, *sua sponte,* then that question has to be material; and the refusal of the court to permit the answer clearly deprived the petitioner of a fair trial.

When the petitioner sought to learn where the informant worked, or if she ever sold drugs, or used cocain, the witness was permitted to take refuge in the V Amendment. (A 425, 426, 427)

When asked if she had ever testified falsely against another man and later made an affidavit attesting to her perjury, the Court permitted her to refuse to answer the question on Fifth Amendment grounds.

When asked if she knew other government informers or had any experience with people going to court, the court refused to allow the answer. (A 470)

When asked what she presently did with her life, the court allowed her to refrain from answering. (A 459)

Finally when asked if she hadn't been involved in a robbery armed offense in Mt. Clemens, Michigan, for need of a fix, the Court refused to allow the answer. (A 630)

Each of the foregoing questions was material to the issue of the witness' credibility, and the petitoner was entitled to have the answers before the jury. No court anywhere has the right to shut or seal a witness' mouth to the defendant's questioning; and yet that was done here, in a fashion unprecedented for all of this practitioner's 23 years of practice.

In *Pointer* v. *Texas*, 380 US 400, 13 L Ed 2d 923, 85 SCt 1065, at page 405, the court said:

> *There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the their expression of belief that the right of confrontation and cross-examination is an essentionl and fundamental requirement of the kind of a fair trial which is this country's constitutional goal. Indeed we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process. In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.*

Justice Potter Stewart, in his concurring opinion, in that case, on p. 410 U.S., and p. 930 of 13 L Ed 2d, said:

> *The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is 'one of the fundamental guarantees of life and liberty', and one of the safeguards 'essential' to a*

> *fair trial. It is, I think, as indispensable an ingredient as 'the right to be tried in a courtroom presided over by a judge.'*

In like vein, in *Brookhart* v. *Janis*, 381 US 1, 16 L Ed 2d 314, 86 SCt 1245, Mr. Justice Black confirmed as law that:

> *If there was here a denial of cross examination, without waiver, it would be constitutional error of the first magnitude, and no amount of showing of want of prejudice could cure it.* 384 US 3; 16 LEd 2d 316, 317.

Similar language is to be found in *Barber* v. *Page*, 390 US 719, 20 L Ed 2d 255, 88 SCt 1318, and *Chambers* v. *Mississippi*, 410 US 284, 93 SCt 1038, 35 L Ed 2d 297, 1973.

All of these cases make clear that what was done by the trial court, and affirmed by the Court of Appeals requires a grant to the petitioner of a new trial.

But, even in addition to all of the foregoing cases, the recent decisions of the Courts have made it clear that a witness may not claim any privilege once he takes the stand, to prevent the defendant in a trial being testified against, from asking any question designed to elicit impeaching evidence.

The guiding cases on privilege versus due process and the defendant's rights, are *Branzburg* v. *Hayes*, 408 US 665, 33 L Ed 2d 626, 92 SCt 2646 (1972) and *United States* v. *Liddy, et. al.*, (Re LA Times subpoena, 354 F Supp 208, DCDC, 1972).

Both of these cases stand for the proposition, as stated by Chief Judge Sirica, on page 215 of 354 F. Supp., that "*if impeachment evidence is available, it is critical that the defendant have access to it.*" and further that:

> *It stands reason on its head to contend that justice is served when a prosecution witness . . . may deny a defendant access to materials . . . that might be admissible to impeach that witness.*

In the Liddy case, it was a matter of tapes in the possession of the Los Angeles Times newspaper, which Liddy needed to buttress his defense in a pending criminal case. In the within case the petitioner sought information which the witness could have furnished but declined to do so on the basis of some type of informer's privilege. In neither case can justice be served if a prosecution witness may deny a defendant access to such evidence.

In this case one would be hard pressed to see how the fact of a witness' prior admitted commission of perjury in a State court would be irrelevant to the trial jury's solemn obligation to assess the weight and credit to be given such witness' testimony. Without any extended argument anyone can appreciate the inherent irresponsibility involved in believing an admitted prior perjuror.

The same is true of each of the other questions propounded the witness, which the judge permitted her not to answer, even on Fifth Amendment grounds. For, in *Branzburg* v. *Hayes*, 408 US 665, 33 LEd2d 636, the Supreme Court made clear the priority of the criminal right of confrontation and cross-examination over any claims of constitutional privilege.

On page 698 US, p. 649 of 33 LEd2d and p. 2664 of 92 SCt, the Court said:

> *The purpose of the (informers) privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes*

the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation. Roviaro v. *U.S.*, 353 US 53, 59.

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by Grand juries or at criminal trials.

In the Liddy case, Judge Sirica said on page 211 of 354 F. Supp:

The purpose and importance of subpoenas duces tecum . . . to the judicial process are well known. The authority of courts to subpoena witnesses and evidence is a corollary of the duty to testify at judicial proceedings. The duty to come forward with information relevant to the controversy at hand has been recognized as a fundamental instrument of justice since the earliest days of Anglo-American law.

And on page 215, Judge Sirica continued:

While Branzburg denied a privilege in favor of the public interest in law enforcement, this Court denies a privilege in favor of the rights of an accussed to a fair trial . . . If impeachment evidence is available, it is critical that the defendants have access to it.

In *United States* v. *James Barnes*, cca 8, 1973, 486 F2d 776, the court held that an informant, who was said to be a principal actor, both before and during a criminal event, was subject to examination by the defendant, and that

whatever he was, and whatever he knew was certainly material and relevant. The Court said, on 779, citing *Gilmore* v. *U.S.*, 256 F2d 565, 5 Cir, 1958:

> *In this testimony there might have been the seeds of innocence, of substantial doubt, or overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truth-finding, which should be the aim of every trial, compelled its disclosure.*

All of the petitioner's questions were directed towards showing that the confidential informant was both vicious and wily; and that she'd been involved in a number of questionable activities thoughout her entire life. And, in similar vein, the restriction of the cross-examination of the BNDD agent was improper. His identification testimony as reflected on the 3500 materials was remarkably inapplicable to the defendant; and where the agent's only contact with the events anteceded his testimony by three years, the court had no right to outlaw the defendant's questions of this witness regarding his background and his personnel file, on the basis of any privilege.

In a case where the testimony relative to the transactions, as between the confidential informant and the BNDD agent did not agree in many respects, it would certainly seem that the BNDD agent should have been required to answer the questions propounded him, and no assertion of privilege, however exalted that privilege might be, should have intervened to deny the defendant the benefit of the testimony.

Even Pres. Nixon's executive privilege could not prevail over the demand of John Erlichman in the Ellsberg break-in trial; and, had such privilege persisted, then the trial

judge was aware that he would have to dismiss the case against the accused, rather than subject him to a trial in which his Sixth Amendment rights would necessarily be impaired.

Likewise, when the petitioner herein moved for dismissal of the case against him, if the court intended to honor, and persisted in honoring, these various claims of privilege by the informant and the BNDD agent, the motion should have been granted.

In *People* v. *Esse,* 8 Mich App 362, 154 NW2d 545, the Court pointed out that whenever a trial judge grants a privilege to a witness which relieves him of the duty to fully testify, the remainder of such witness' testimony must be stricken, or the defendant affected thereby is unconstitutionally deprived of the opportunity to full cross-examination of the witness.

II.

FAILURE OF THE TRIAL COURT TO PERMIT THE PETITIONER TO OFFER WITNESSES OF HIS OWN CHOOSING CLEARLY VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHTS.

As a part of his defense, and via rebuttal of the testimony of the confidential informant, the petitioner sought to put on several witnesses, whose testimony the court refused to receive.

First of all, because the informant had testified that she had been confined in the Mt. Carmel hospital at the beginning of the trial, the petitioner subpoenaed the Mt. Carmel hospital records which failed to indicate her presence in the hospital as a patient.

The informant had stated on the stand that she had received a "cut-down" during her confinement in Mt.

Carmel. In an attempt to show that a "cut-down" had been employed as a surgical procedure in the witness' case because of collapsed veins, and that this procedure is frequently employed upon junkies, the petitioner desired to have the hospital records introduced.

Asst. U.S. Atty, William Ibershof, stated, on p. A622, that the records were not in the hospital because the bureau of narcotics had requested that the hospital remove the informant's records in order that her "whereabouts be protected."

The petitioner stated that the purpose of the subpoena was to determine why the informant was hospitalized, and to see why the doctors had to perform a "cut-down" and not for the purpose of determining the whereabouts of the informant. (A622, 623) The Court nonetheless refused to allow the petitioner to produce this testimony. (A624)

Further, the petitioner requested that the government furnish the BNDD agent's personnel records for defense inspection. The government claimed that the records were "confidential," (A612) and claimed a privilege against production of the records. The court sustained the claim (A616) The petitioner moved to strike all of the agent's testimony, because of this denial to him of his sixth amendment right to full cross-examination of the agent. (A616, 631)

Then the petitioner called, Attorney Wilfred Rice, (634, 677), and offered him for the purpose of establishing that the confidential informant had participated in a vicious armed robbery and kidnapping in Mt. Clemens, Michigan, in November of 1969, and had been represented by him; and that, in March of 1970 she pleaded guilty to attempted robbery armed, and during the taking of that plea stated

under oath that she robbed the victim because she needed a fix. (A636)

This evidence, combined with the transcript of her sworn testimony would have rebutted the false inference that the confidential informant was not a junkie.

Rice's testimony would also have shown that, after the entry of the plea, he was never contacted; that the informant's sentence was delayed for over one year, and that the case was remanded to justice court where the kidnapping charge was nolle processed; and that during this period, she became a police informant. (A636, 637)

The petitioner stated to the court, that the totality of these circumstances should be allowed before the jury to enable it to cast light on the testimony the informant had already given, and to show her conniving nature. (A637)

The court denied the petitioner the right to call Mr. Rice, stating:

> *The witness herself is not on trial in this case. The case is a case against the defendant in this case. In light of the disclosures that counsel has made for the purpose for which the waiver is requested, it seems to me the question is completely irrelevant at this time, that none of the testimony pertaining to the matters to be disclosed would be relevant. They would be collateral . . . and would lead us off into side tracks that are not relevant to the trial of this case.* (A641)

The petitioner moved again to strike all of the informant's testimony. (A645, 646.)

In *Chambers* v. *State of Mississippi*, 410 US 284, 35 L Ed 2d 297, 93 SCt 1038, on p. 312 (US) and on p 1049 of the SCt report, the Court had this to say:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Webb* v. *Texas*, 409 US——; 34 LEd2d 330, 93 SCt 351; *Washington* v. *Texas*, 388 US 14, 19, 18 LEd 2d 1019, 87 SCt 1920; *In re Oliver*, 333 US 257, 92 LEd 682, 68 SCt 499.
>
> . . . The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> . . . We establish no new principles of constitutional law. . . . Rather, we quite simply hold that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

In *Washington* v. *Texas*, 388 US 14, 19, 18 LEd 2d 1019, 1023, the Court said:

> The right of offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

The opinion of the Court of Appeals does not even treat with this assignment of error; but, it is nonetheless clear that the petitioner was denied a fair trial in the first instance, and a fair appeal in the second instance, by the appeals court refusal to deal with the question in any manner.

III.

FAILURE OF THE GOVERNMENT TO PRESERVE A HAND-WRITTEN NOTE AND FIVE DOLLAR BILL CLAIMED TO HAVE BEEN GIVEN A BNDD AGENT AT THE TIME OF HIS PURCHASE OF NARCOTICS VIOLATED THE PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

In its opinion, the Court of Appeals said:

> We find no substance to the claim that the government withheld or destroyed evidence arguably material and which might have led the jury to entertain a reasonable doubt about (defendant's) guilt. *United States* v. *Bryant,* 439 F2d 642 (DC Cir. 1971.)

The evidence clearly established that the BNDD agent did not preserve a note he claimed the seller of narcotics gave him at the time of his purchase of narcotics. This note was said to have been in the handwriting of the seller, and to contain two telephone numbers. (A107, 134, 135.) He also claimed that the seller gave him a five ($5.00) dollar bill in change. Upon hearing this, the petitioner demanded production of both items (A 612, 616.) The Agent said he could not produce either item, and that the note had been destroyed. (A193, 194); that he did not know what he did with the note; that he did not take down the serial number off the five ($5.00) dollar bill; and did not return the five ($5.00) dollar bill on a separate voucher. (A699.)

It is clear, that if the writing of such a note were not the petitioner's, then a jury would be hard pressed to convict him as the seller of the narcotics involved.

That consideration, alone, satisfies the criteria set forth in the case of *Bryant* v. *United States,* 439 F2d 642, 648. There the Court said that *"the due process requirement applies to all evidence which 'might have lead the jury to entertain a reasonable doubt about the defendant's guilt,' and this test is to be applied generously to the accused* when there is 'substantial room for doubt' as to what effect disclosure might have had."

Without the note being preserved, how could the Court of Appeals state categorically that the evidence withheld would not have led the jury to entertain a doubt of the defendant's guilt, The government's failure to preserve such evidence, if it existed, cannot be made the basis for the Court of Appeals nullifying the petitioner's constitutional right to its preservation.

And, further, the Court of Appeals is in no more position to *presume* that the note *would not be* wholly exculpatory, than it is to assume that it would bear out the BNDD agent's testimony. In the absence of any evidence from which to test the writing on the note, *Bryant, supra,* must be held to apply.

The same is true of the currency, which could well have been dusted for fingerprints, or traces of contraband powder.

For the Agent not to event photostat or preserve this evidence is unbelievable; but, for the government to offer no testimony to justify the "loss" of such vital evidence, concludes the matter in the petitioner's favor. For in *U.S.* v. *Augenblick,* 393 US 348, 21 LEd2d 537, 89 SCt 528,

1969, the Supreme Court held that the government has the burden of either producing vital evidence or explaining why it could not do so; and the failure to preserve vital evidence *will not be excused* unless the government shows that it has "promulgated, enforced, and attempted, in good faith, to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation."

And, *Brady* v. *Maryland*, 373 US 83, at p. 87, makes clear that the duty of preservation attaches to and includes any evidence that "might" be "favorable" to the accused.

IV.

FAILURE OF THE JURY CLERK TO COMPLY WITH THE PROVISIONS OF §1869(c), TITLE 28 U.S.C., BY USE OF THE MOST RECENT "OFFICIAL" STATE OR FEDERAL GENERAL ELECTION REGISTRATION LISTS, AT THE TIME OF THE FILLING OF THE MASTER JURY WHEEL, VOIDED THE GRAND AND PETIT JURIES IN THIS CASE; AND INTERVENTION OF UNAUTHORIZED PERSONS IN THE SELECTION PROCESS, AND REMOVAL OF COURT RECORDS FROM THE COURT, VOIDED THE GRAND AND PETIT JURIES IN THIS CASE.

The Jury selection plan for the Eastern District of Michigan was adopted on September 23, 1968, to become effective 90 days therefrom, that is to say, on and after the 22nd day of December, 1968.

The provisions of Title 28 U.S.C., sect. 1863, clearly provide that the jury selection plan put into operation by any District Court "must . . . comply with the provisions of this title."

The statute requires that the plan put into effect must (2):

> "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of active voters of the political subdivision within the district or division."

The plan adopted for the Eastern District of Michigan, in paragraph three (3) thereof, clearly provided:

> "Names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all political subdivisions within the relevant divisions."

Section 1869(c) of Title 28 U.S.C., clearly defines and limits the term, "Voter Registration Lists" to mean:

> "The *official* records *maintained* by State or local *election officials* of persons registered to vote in either the most recent state or the most recent federal general election."

The congressional intent is stated in 1968 U.S. Code Cong. & Adm. News, at page 1806, and it states:

> The definitions of the terms "voter registration 'lists' and 'lists of actual voters' in subsection (c) and (d) are restricted to apply to either the most recent State or the most recent Federal General election." Your committee intends that a general election be understood as one in which statewide voting takes place, even if the candidates do not represent all parts of the State. Thus, for example, regular elections for members of the House of Representatives are "general" elections within the meaning of this bill.

In Michigan, the August primary of 1968, at which members of the House of Representatives were nominated, was the most recent State and Federal election to the time set for the filling of the master wheel.

For, Section 168.534 of the Michigan Compiled Laws provides, in very explicit language:

> "A *general* primary of all political parties . . . shall be held in every election precinct in the State on the Tuesday succeeding the first Monday in August preceding every general November election, at which time the qualified and registered voters of each political party may vote for . . . U.S. Senator, Representatives in Congress. Governor . . . etc."

The *registration lists* for that election are, by law, *completed and closed* on the Fifth (5th) Friday preceding the day of such primary election. (Sect. 168.497 Michigan Compiled Laws.) That date would therefore be sometime around the First of July of 1968.

Accordingly, the only list of voters available to the jury clerk for compilation of the master wheel under the Eastern District Jury Plan, was that list of voters in the hands of the election officials on July 1, 1968.

The proofs adduced upon hearing in the District Court established that the election officials could furnish a computer run of the registration list within 24 hours, and that the costs for such run could and would be waived to the federal government. (A11. 26.)

The master wheel was ordered to be filled during the period of August to December of 1968. Certainly, where the registration list of persons registered to vote in the

most recent Federal or State election was in existence, and in the hands of local election officials as of July 1, 1968, fully a month prior to the time when the Judges of the District said the initial wheel should be filled, and fully six months prior to the effective date of the plan, the failure to use the proper list constituted a wilful and deliberate disregard of the Congressional intent, and the letter of the applicable law.

Every case, in which this issue has been raised, until now, has stated, in substance, that, at the time of the filling of the master jury wheel, the jury clerk *must* use the most recent federal or state general election registration list, unless there exists "no alternative list readily and practically available."

That is the clear import of *U.S.* v. *Guzman*, 317 F Supp 140, 145; 468 F2d 1245; *cert. den.* 410 US 937, *supra.* That is the clear import of *U.S.* v. *Blair,* 370 F2d 331; and of the District Court cases of *U.S.* v. *Deardorff,* 343 F Supp 1033, 1042; and *United States* v. *Matthews,* 350 F Supp 1103, 1110. Each of these decisions indicates that §1869(c), Title 28 U.S.C., insures that, at the time of the filling of the master jury wheel, the clerk *must* resort to the most recent "official records" *available* in time to permit compliance with the statutory language.

The trial court, in ruling on the petitioner's motion, determined that November 8, 1966 was "the most recent" federal election proximate to the compilation of the master jury wheel on the assumption that:

> This Act could apply to either the most recent State or the most recent Federal General election. 1968 U.S. Code Cong. & Adm. News, p 1806."

And then, the court went on to state:

> "The U.S. District Court for the Eastern District of Michigan, apparently chose to fill out its master jury list with persons registered in the *most recent federal general election.*"

That language highlights the error below. The trial court failed to perceive that the election of August 6, 1968, being a state-wide election for members of the Congress, as well as a state-wide general election for Governor of the State, was *both* a State and Federal General election, within the plain intendment of the Congress.

Michigan Statutory Law and the Congressional Statement of intent as set forth hereinabove from p. 1806, U.S. Code Cong. & Adm. News, remove all doubt of that construction.

Thus, the Court of Appeals was in error in stating that it *"finds no error of law on this issue:"* The clerk had no right to use any list other than that of voters registered to vote in the August of 1968 general primary election.

Furthermore, the Jury Selection Act provides, additionally, at §1869(c) of Title 28 U.S.C., that the list of voters from which the jury clerk obtains her names to fill the master wheel must be:

> *"The official records maintained by State and local election officials."*

This section does not permit the use of *xeroxed copies* of voter registration lists held by other jury commissioners. Yet, the record here, affirmatively shows, that the names used to fill the Eastern District of Michigan master wheel came from xeroxed copies of the voter registration

lists held by the Recorder's Court Jury Commissioners. (A43.)

Such a list could hardly rise to the level of the "*official records*" maintained by the Election Commission. An official computer run is known to be complete, and to include all possible registrants up to the time it is furnished. A list held by another court's jury commissioners might, or might not, be complete, or partial,—How could anyone actually know? In any event it must be assumed that the Congressional statement of origin must be controlling, and absent some suggestion in the law that the Congress did not mean what it said, then obtaining a substitute list from a source other than that indicated by the Congress, must be unlawful.

Moreover, § 1863(b)(1) and § 1863(b)(3) of Title 28 U.S.C. require that the selection process be carried out by the "clerk" of court. The Jury Plan, in paragraph 4, thereof, requires the "clerks" to make up and "maintain" the master jury wheel.

"Clerk" is defined in § 1869, Title 28 U.S.C., as meaning "a Clerk of the District Court of the U.S., or any authorized *deputy clerk*."

Neither the Act, nor the Plan vested any authority in any one other than a "clerk" to interfere in the compilation of the master jury Wheel.

Long ago, in 1915, a federal court in New York had to throw out a jury panel because a U. S. Attorney, not authorized to be involved in the Jury selection process became so involved, along with a secretary needed to assist in the compilation.

In voiding the panel, the Court said in *United States* v. *Murphy et al.*, 224 Fed. Reptr. 554, on page 562:

It is evident from the reading of the statute that the selection of names to go in the jury box is to be made by the commissioner of jurors and by the clerk of the court . . . No other person or official has the right to participate in such selection. . . . There should be no question that the selection was made by those in whom the power is vested. To this end statutory directions as to the selection of jurymen should be followed in all essentials, unless they relate to mere form of procedure, and even in such cases a departure therefrom . . . has been fatal to the entire panel.

In criminal cases, especially, it is all-important that all legal safeguards provided by the Legislature of the State, if we are in state courts, or by acts of Congress, if we are in the United States Courts, be observed.

And, on page 564, the Court said:

But behind and underlying all is the general principle, universally recognized, that the courts cannot justly or safely permit or sanction any participation by unauthorized persons . . . in the selection of names of persons to go on the jury lists, or in the jury boxes, from which panels for service are to be drawn, no matter how high-minded and conscientious the purpose of the party participating, . . . Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely.

To like effect is *U.S.* v. *Roemig*, 52 F Supp 857, 861, DC ND Ia, 1943; and *Glasser* v. *United States*, 315 U.S. 60, 85.

As was also indicated in *U. S.* v. *Zirpolo,* 450 F2d 424, on page 429, 1971, "The law requires that the 'standards and designs prescribed by Congress be followed.' And, on page 430, 'The question is whether authority for the practice may be found in the statute.' " And, as stated in *Abbott* v. *Mines,* 411 F2d 353, 1969, on page 355, "One of our functions as a Federal Appellate court is to watch over jury selection procedures to guard against frustration of the congressional purposes behind them. . . . We must eliminate any tendencies that undermine and weaken the institution of jury trial as it operates in federal courts."

The record below establishes, without a doubt, that the jury clerk, Jeanne Burge, admitted that she had her sister come to the federal court on Saturdays to help her with her work, which had to do with the compilation of the master jury wheel. At no point during the hearing held did Miss Burge deny these allegations; and the senior clerk admitted that he had been apprised of the fact, and advised her that it should stop.

But, the fact is it occurred—i.e., that an unauthorized private person was involved in the jury selection process, where she had no right. As stated in *Murphy, supra,* "Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely."

Moreover, the prohibition, contained in Section 10 of the Eastern District Plan, relating to the "maintenance of jury wheels as private to the clerk, until prospective jurors have been summoned and have appeared at the courthouse", excludes any participation by any person not a clerk as defined in law, in the compilation of the master wheel, or penetrating its secrecy.

To validate the master wheel in the present case we would have to overlook and treat as *de-minimus* everything that goes to the very heart of the Jury Selection Act and the Jury Selection Plan.

We would have to first of all okay the use of out-dated voter registration lists; then, we would have to disregard the taking of names from a xerox copy of a voters registration list held by the Recorder's Court Jury Commission, instead of the Election Commission; then, we would have to overlook the taking of the records out of the building to a private home, where every temptation and possibiilty for impropriety, if not outright fraud, exists; and finally, we would have to okay private person having access to, and working with the names placed on the master wheel, all in open defiance of the terms of the Federal Jury Selection and Service Act and the Eastern District Jury Plan.

If all of these defects do not constitute substantial noncompliance with the Jury Selection Act, then this writer has absolutely no conception of what the term means.

V.

FAILURE OF THE COURT OF APPEALS TO RULE UPON ONE OF THE QUESTIONS PRESENTED IT BY AN APPELLANT CONSTITUTES A DENIAL OF DUE PPROCESS OF LAW.

In the within case, the Court of Appeals deliberately refused to pass upon the petitioner's citation of error related to the failure of the trial court to permit him to subpoena witnesses in his defense.

That failure constitutes a serious denial to the petitioner of due process of law.

In *Morrissey* v. *Brewer*, 408 US 471, 33 LE2d 484, 92 SCt 2593, the Supreme Court held that due process requires, at a minimum, that a decision maker "state the reasons for his determination, and indicate the evidence he relied on." p. 498 LEd2d. That same principle appiles, it would seem, to Courts of Appeal.

Petitioner prays that your Honor will consider his complaints to be of sufficient constitutional magnitude to warrant this Court's review.

Respectfully submitted,

MILTON R. HENRY
Counsel for Petitioner

EXHIBIT A

NO. 73-1358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee,* vs. Ernest McNeal, Jr. *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed December 27, 1973.

Before: Weick, Edwards and Lively, Circuit Judges.

Per Curiam. This is the appeal from conviction on three counts of an indictment charging one purchase and two sales of heroin, in violation of 26 U.S.C. §§4704(a) and 4705(a) (1970). Appellant was sentenced to concurrent terms of ten years on the purchase count and fifteen years on the two counts pertaining to sale of heroin.

On appeal defendant-appellant's principal attack is directed at claimed error in the District Judge's refusal to quash the indictment because of asserted variances from the provisions of the Jury Seletcion Act of 1968, 28 U.S.C. § 1861 *et seq.* (1970). Appellant claims that the voter registration list employed for the jury wheel from which the

grand jury in question was chosen was not the list of persons registered to vote in the most recent state or federal general election, that the list had not been procured from the Election Commission of the City of Detroit, as provided for by the Jury Plan, and that a person who was not a federal employee, namely the sister of the jury clerk, had allegedly worked on the selection of the names to go into the jury wheel.

On disputed but persuasive evidence, the District Court found that the voter lists which were employed were 1967 lists. The court also held that the "most recent" election within the meaning of 28 U.S.C. § 1869(c) was that of November 8, 1966. We find no error of fact or law on this issue.

As to the source of the voter list, it appears that the jury clerk procured an official list of registered Detroit voters from the Recorder's Court of the City of Detroit rather than from the Election Commission. While this seems somewhat inappropriate to us, it does not violate the language of 28 U.S.C. § 1869,(c), since the lists used were "official records" which had been supplied to Recarder's Court by the "local election officials" within the meaning of 28 U.S.C. § 1869(c).

As to the sister of the jury clerk, there is no evidence that she played any role in choosing names for the jury wheel, nor is there any hint of misconduct on her part.

28 U.S.C. § 1867(d) (1970) provides the standard for challenging compliance with selection procedures. We find (as did the District Judge) that there was no "substantial failure to comply with the provisions" of the act.

We have read the instances of limitation of cross-examination complained of by appellant concerning his trial

and we do not find that any relevant questions were excluded.

Nor do we find any substance to the claim that the government withheld or destroyed evidence arguably material and which "might have led the jury to entertain a reasonable doubt about [defendant's] guilt." *See United States* v. *Bryant*, 439 F2d 642 (D.C. Cir. 1971.)

The judgment of the District Court is affirmed.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, vs. Ernest McNeal, Jr., Defendant-Appellant.	No. 73-1358

ORDER

(Filed June 4, 1974)

Before: Weick, Edwards and Lively, Circuit Judges.

On receipt and consideration of motion for rehearing and suggestion for rehearing in banc; and

A majority of the court having failed to vote in favor of rehearing in banc and the petition having been referred to the panel which originally heard the case (Judge McCree, dissenting); and

Said panel finding no issue presented in the motion for rehearing which had not been given adequate consideration prior to the original decision of the court,

Said motion for rehearing is hereby denied.

Further, a motion for stay of mandate pending application for writ of certiorari is likewise denied, and unless a stay is granted by the Supreme Court, the mandate will issue in accordance with the rules.

Entered by order of the Court
/s/ John P. Hehman
Clerk

Exhibit "C"

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER AND VACATE OPINION DENYING MOTION TO QUASH GRAND JURY INDICTMENTS AND DISMISS CAUSES

(U. S. District Court—Eastern District of Michigan—Southern Division)

United States of America,
Plaintiff,
vs.
Eddie Jackson, et al,
Defendants.

Criminal Action
No. 46597

United States of America,
Plaintiff,
vs.
Willie Lee Kilpatrick, et al.,
Defendants.

Criminal Action
No. 46598

Defendants bring a motion to "vacate, reconsider, [and] re-promulgate" the opinion of this court regarding the quashing of grand jury indictments. They also move to vacate the order denying the dismissal of causes and for leave to produce additional evidence. Specifically, they object to the conclusions of this court set forth in a Memorandum Opinion and Order issued June 16, 1972. The opinion and order were issued after several days of hearings which resulted in over three hundred typewritten pages of testimony as well as the introduction of a number of exhibits.

Defendants argue that this Court erroneously concluded that a 1967 Detroit voter registration list was utilized in implementing the 1968 "Plan of the United States Dis-

trict Court for the Eastern District of Michigan in the random selection of Grand and Petit Juries" [hereafter referred to as the Plan or Jury Plan]. Defendants maintain that a 1965 list was employed.

A careful examination of the record does not support defendants' contention. There is conflicting testimony on the issue. But sufficient evidence was presented to sustain this court's finding—the 1967 Detroit voter registration list was used.

Defendants argue also that even if the 1967 voter registration list was employed, use of this list violated the Jury Selection Act of 1968, 28 U.S.C. § 1861, *et seq.* [hereafter referred to as the Act]. According to 28 U.S.C. § 1869(c), the proper voter registration list is one consisting "of persons registered to vote in either the most recent State or the most recent Federal general election."

The Jury Plan called for the filling of the master jury wheel between August 1, 1968, and December 1, 1968. The Plan was approved September 23, 1968, to become effective December 22, 1968.

It would be unreasonable to find that the voter registration lists appropriate to implement the Plan would be those existing as of the effective date of the Plan (December 22, 1968). Certainly the ninety days between approval and effective dates was to allow time to compile voter lists as well as to deal with other administrative matters. Thus, the statutory requirement for use of voter registration lists from "the most recent State or most recent Federal general election" is relative to either August 1, 1968, or September 23, 1968.

A "most recent" State general election as applied to the facts at bar was held either November 8, 1966, or August 6, 1968, depending on whether August 1, 1968, or

September 23, 1968, is considered the date officially signalling jury list compilation under the Plan. Using either date, the "most recent" federal general election was held November 8, 1966.

Congress intended to "permit the plan to choose between State and Federal lists." The Act could "apply to either the most recent State *or* the most recent Federal general election." (Emphasis added.) 1968 U.S. Code Cong, and Adm. News, p. 1806. The United States District Court for the Eastern District of Michigan aparently chose to fill out its master jury list with persons registered in the most recent federal general election. Thus, the Plan conforms with the law.

Moreover, to urge any other construction of the Plan is to exalt form over substance. Congress, in allowing plans to choose between reference to the "most recent" State or federal general election intended only to "insure that the list used will in any event not be more than 2 years old." *Id.* at p. 1807.

Thus, the use of the 1967 Detroit voter registration list to implement the 1968 Jury Plan was in accord with both the letter and the spirit of the Jury Selection Act of 1968.

Defendants also argue that the failure of the United States Disctrict Court for the Eastern District of Michigan to obtain the Detroit voter registration list from the Detroit Election Commission violated the Act. Defendants urge this position citing the relevant statutory language: "'Voter registration lists' shall mean the *official records maintained* by State or local *election officials* . . ." 28 U.S.C. § 1869(c). (Emphasis added.)

Testimony supports the conclusion that the voter registration list at issue here was an official record in the pos-

session of local officials. It is true that this official record was not in the possession of local *election* officials, but this court does not find this discrepancy the kind of "substantial failure to comply with the provisions of this title" which justifies the relief sought here. 28 U.S.C. § 1867(d).[1]

Defendants contend that this federal court's obtaining of a list of registered voters from Detroit's Recorder's Court is no less infirm than had the court secured such lists from "some public spirited organization." We reject that argument. The court obtained an official voter registration list from a sister court, and that satisfies the spirit of the Act.

If there had been some impropriety in the utilizing of an official voter list possessed by Detroit's Recorder's Court, a different result might follow. In such a situation, the concern of Congress that lists be from "election officials" would be of critical importance. But where, as here, there is no showing of impropriety, this court holds that there was no substantial failure to comply with the provisions of the Act by the utilization of the Recorder's Court list obtained from the City Election Commission.

Defendants do not challenge the constitutionality of the Jury Selection Act of 1968 as amended. 28 U.S.C. § 1861

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[1] § 1867. Challenging compliance with selection procedures . . .

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. . . ."

et seq. Public Law 92-269, 86 Stat. 117. Thus, it is difficult to perceive how the Plan is unconstitutional if it conforms to that Act. The amended Act requires juries to include 18-year-olds by September 1, 1973.

Finally, this court takes note of the affidavit of Professor Hans Zeisel which has been offered by defendants and received into evidence. This court appreciates the work Professor Zeisel has done in studies on the jury system. But this court senses more advocacy than objectivity in his affidavit. In any event, his conclusion that the systematic exclusion of persons in their twenties from a jury is not pertinent to this case. The jury wheel did contain a selection of jurors from persons who were twenty-one years old or older on the 1967 voter registration lists. Many of these people are still in their twenties.

This court again notes that this affidavit does not establish that young adults in their twenties are a legally cognizable group. Accordingly,

It Is Ordered that defendants' motions to reconsider and vacate the opinion denying motion to quash grand jury indictments and dismiss causes be, and the same are, hereby denied.

/s/ John Feikens
United States District Judge
/s/ Philip Pratt
United States District Judge

Dated: Detroit, Michigan, October 24, 1972.

Exhibit "D"

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO QUASH GRAND JURY INDICTMENTS AND DISMISS CAUSES

(U. S. District Court—Eastern District of Michigan—Southern Division)

Defendants in these cases have raised objections to the manner of selection of the grand jury which returned the indictments. These objections are based on the failure to include the names of 18 to 21-year-old voters on the master jury wheel, the failure to draw up the master list more frequently than every four years, and on the procedures used in compiling the list of jurors from voting lists.

In 1968 Congress passed the Jury Selection Act. Pursuant to that Act, the Sixth Circuit Court of Appeals approved a plan for the courts of the Eastern District of Michigan.

That plan required that the jury be selected every four years. The jury lists were compiled during the summer and autumn of 1968 and went into use January 1969. According to the plan, the jury rolls will again be made over after the general national election in 1972 and will be in use from January 1973 to 1976.

Defendants argue that this method is deficient, first because between 1968 and 1972 the 26th Amendment was adopted extending the franchise to 18 to 21-year-olds without any change in the jury rolls, and secondly, selection every four years causes the lists to age so that at the end of four years no person on the panel would be younger than 25 years.

As to the lack of 18 to 21-year-olds on the jury roll, we agree with the decision of the Ninth Circuit in *United States v. Duncan,* 11 Crim. L. 2003, holding that this lack does not invalidate the grand jury wheel.

While we agree that the passage of the 26th Amendment will require that 18 to 21-year-olds must be included in the jury lists when those rolls are next filled, this does not mean that they must be included on these rolls now. Congress approved on April 6, 1972, amendments to the Jury Selection Act of 1968, Public Law 92-269, 86 Stat. 117, which require that 18-year-olds be included on the jury wheels no later than September 1, 1973.

The 1968 Jury Selection Act states as policy in Section 1861 that "all citizens shall have the opportunity to be considered for service on grand and petit jury." That statute prohibits discrimination and prescribes the method of drawing juries from the voter registration lists. In Section 1865(b) (1), the statute states that a person is qualified unless he "is not a citizen of the United States twenty-one years old."

The legislative history does not shed any particular light on the requirement of age. However, throughout the statute and House Report No. 1076, voting age is linked to jury service age. Voting is traditionally the mark of full participation of citizenship:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U.S. 553, 561, 562 (1964).

Once 18-year-olds have been accorded the right of participation in the affairs of government, they may not arbitrarily be restricted from other rights such as jury service unless they fail to meet other minimum qualifications.

Practical considerations also impel this court to conclude that the selection of the grand jury returning indictments in these cases is not in violation of the Jury Selection Act because of the exclusion of 18-year-olds until the next filling of the jury rolls. The procedure outlined by the Jury Selection Act is very comprehensive and designed to secure a fair cross-section of the community, although not necessarily a mirror image. An interim change in the law does not automatically require a refilling of the polls if there is still a fair cross-section. Congress reached the same conclusion in Public Law 92-269. Section 4(a) of that act states that the jury wheels which are filled prior to September 1, 1973, will be valid. For the same practical considerations, we agree with *Duncan* that the necessary aging of the jury lists during these four years of use (as mandated by the plan adopted by the Eastern District) does not present a substantial claim. The fact that the youngest persons on the list must be near 25 does not impel the conclusion that young people are being discriminated against and that the selection of the jury is improper.

> "Carried to its logical extreme it would require a new selection of names from the voters lists and a new drawing from the master jury wheel every time a jury is to be drawn." *United States v. Duncan*, 11 Cr. L. 2003, 2004 (1972).

See also *King v. United States,* 346 F.2d 123 (1st Cir. 1965), and *United States v. Criminal Court,* 442 F.2d 611 (2nd Cir. 1971).

Since absence of 18 to 24-year-olds on the grand jury list poses no statutory invalidity, there remains the question whether this absence from the polls denies the defendant the right to a fair and impartial grand jury. *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946).

A number of courts have ruled on the question of under-representation of young people. Some courts have accepted the proposition that young people constitute a legally cognizable group. *United States v. Butera,* 420 F.2d 564 (1st Cir. 1970); *United States v. Sinclair,* Criminal Action No. 44375, January 28, 1971 (E.D. Mich.). Even more have not, *United States v. Gargan,* 314 F. Supp. 414 (W.D .Wis. 1970):

> "I find and conclude that neither of these contentions is of serious import, and that the function of the grand jury can be and will be performed with reasonably consistent results by jurors chosen by methods in which there is some unevenness in the representation of various specific age groups." 314 F. Supp. at 417.

See also *United States v. Allen,* 445 F.2d 849 (1971); *United States v. Comara,* 451 F.2d 1122 (1st Cir. 1971).

Defendants have presented no evidence to show that young people are a legally cognizable group so as to indicate that their underrepresentation would affect the fairness of the grand jury. There is no reason, except that based upon speculation, to believe that young people differ in any respect from other persons except by that single factor. *United States v. Giacalone,* Criminal Action No. 43792 (E.D. Mich. March 12, 1971).

The final objetcion to the composition of the grand jury refers to the method of compilation of the names and the procedures followed by the jury clerk.

When the new Jury Selection Act went into effect, the clerk of the District Court and the jury clerk began the process of obtaining the requisite number of jurors from the various political subdivisions within the Eastern District of Michigan, Southern Division. Letters were sent to political subdivisions asking that names be sent from the registration lists according to a certain formula, so that a pre-determined number of jurors would be obtained with the desired randomness.[2] When the clerk inquired about the Detroit list, the Detroit Election Commission informed him that there was a charge of ½ of $.01 for each name if a complete voter registration list was purchased. On further inquiry, the clerk learned that the Recorder's Court for the City of Detroit had a current voter registration list. Arrangements were made for copying that list and employees of the District Court were sent to the Recorder's Court where they copied down every sixty-second name by hand and made their own lists.

Defendants argue that as a result of this procedure several irregularities in the compilation of names occurred. First, affidavits were submitted which tend to show that the Recorder's Court supplied the District Court with an out-of-date list, one from 1965 rather than 1967. Other evidence sufficiently refutes this contention. Over 20 names were proved to have been derived from the Recorder's Court list which would not have been on a 1965 list since they were first registrations for persons who turned

[2] The jury clerk testified that the political subdivisions were instructed to select the ninth name on the list and every sixty-second name thereafter.

21 after 1965. Furthermore, the lists compiled by the District Court are from lists organized by districts rather than by wards as formerly. The district organization method was adopted for the first time beginning with the 1967 list and it would have been impossible for a list drawn from the 1965 list to reflect that new district organization method.

Defendants also introduced the testimony of one Mrs. Ethel Robiscoe, a clerk who worked under the supervision of the jury clerk, Mrs. Jeanne Burge. It appeared that Mrs. Robiscoe was ultimately fired by the Clerk of the Court. Her testimony, if credited, would tend to show that the jury clerk exercised prejudicial criteria in her recommendation as to qualification of some of the jurors for service. But it is uncontroverted that regardless of the nature of her recommendation, it was the Chief Judge of the District Court, the Honorable Ralph M. Freeman, who ultimately passed on each juror's qualification.

Mrs. Robiscoe also testified that the jury clerk after pulling tabs for juries would put some tabs back in, thus violating procedural rules. Furthermore, the jury clerk on occasion would remove the jury records and take them home to work on them.

As to the first matter, the putting back of tabs, even if this had occurred during the period Mrs. Robiscoe was in the employ of the District Court, such could not have affected the selection of the grand jury herein involved, as that procedure had been changed prior to their selection. The names are now drawn by the clerk of the court from the jury wheel in the presence of a deputy marshal and an assistant United States attorney in open court.

As to the removal of the records from the clerk's Office, this court is hesitant to discourage employees of

the Government from putting in extra hours on their jobs. Such virtue is all too rare. Mrs. Robiscoe, moreover, was not able to determine which records were removed from the office and thus we are not able to conclude that the jury lists were removed from the courthouse.

Finally, defendants argue that even if in fact the 1967 list was used, this list was incorrect since the statute defines voter registration as "the official records maintained by state or local election officials of persons registered to vote in either the most recent state or most recent federal general election." 28 U.S.C. § 1869(c).

The plan adopted by the Eastern District of Michigan required the master jury wheel to be filled between August 1 and December 1, 1968. On August 1, the most recent list was that of registered voters in 1967. Therefore, neither the intent nor the letter of Section 1869 was violated. Accordingly,

It Is Ordered that in the case of *United States v. Eddie Jackson, et al,* No. 46597, and *United States v. Willie Lee Kilpatrick, et al.,* No. 46598, heard together for the convenience of the parties and the court, the defendants' motion to quash indictments and dismiss causes be, and the same is, hereby denied.

/s/ Philip Pratt
United States District Judge
/s/ John Feikens
United States District Judge

Dated: Detroit, Michigan, June 16, 1972.

Exhibit "E"

ORDER DENYING DEFENDANTS' MOTION TO QUASH INDICTMENT AND TO DISMISS

(U. S. District Court—Eastern District of Michigan—Southern Division)

United States of America,
Plaintiff,
—vs—
Ernest McNeil, Jr.,
Defendant.
Criminal No. 45362

At a session of said Court held in the Federal Building, Detroit, Michigan, on September 6, 1972.

Present: Honorable Charles W. Joiner, United States District Judge.

The defendant by his attorney having filed a Motion to Quash Indictment and to Dismiss Cause, and the parties having appeared in open court and having had an opportunity to be heard;

Now, Therefore, It Is Ordered:

(1) The defendant's Motion to Dismiss this cause for delay in bringing this prosecution is denied.

(2) In accordance with the agreement of the parties concerning the defendant's Motion to Quash Indictment for Defective Grand Jury Venire, it is ordered that to the extent that the issues raised in this motion have been or will be disposed of in *U. S.* v. *Jackson,* Criminal No. 46597, and *U. S. v. Kilpatrick,* Criminal No. 46598, now pending in the United States District Court, Eastern District of Michigan, both sides will be bound by those results, without prejudice,

however to the rights of the defendant or the government to petition this Court for a re-hearing of those issues.

/s/ Charles W. Joiner
United States District Judge

Approved as to form:

Milton R. Henry
Attorney for Defendant